DATO' YAP PENG @ YAP PIANG TAU

v.

PUBLIC PROSECUTOR

HIGH COURT, KUALA LUMPUR
DATUK HJ. MOKHTAR HJ. SIDIN J.
[FEDERAL TERRITORY CRIMINAL APPEAL NO. 42-45-91]
6 FEBRUARY 1993

CRIMINAL LAW AND PROCEDURE: Criminal breach of trust - Whether investments were for Accused or for the Koperasi - Loan not properly documented - No evidence money used by Accused • Whether the money taken were loans.

EVIDENCE: Appeal-Disturbing findings of fact made by lower Court by appellate Court - Accomplice • Tainted witness - Probative weight • Notes of judicial proceedings of a Australian Court- When it is admissible.

The appellant at the material time was the Chairman of the Board of Directors of Koperasi Sepadu Berhad (Koop) and also the Chairman of the Executive Committee (Exco) of Koop and Chairman of Dayapi Holdings. The appellant before leaving for Australia informed his Administration and Financial Manager (PW15) to prepare the necessary applications to the Koop for three separate loans under three different names of members of the Koop. The appellant also gave instructions to PW15 to collect the necessary collaterals for these loans from his sister. The appellant signed three blank cheques for the purpose of these loans. The appellant told PW15 that he would give the necessary instructions from Australia as to the amounts to be taken by those three named persons. PW15 was also told to cash the cheques and to hand over the cash to the appellant's brother.

Held:

[1] It is trite law that an Appellate Court does not interfere with the findings of facts of the trial Court. But there are exceptions to this rule. An Appellate Court is always empowered to interfere and must so interfere if the so-called findings of facts of the trial Judge suffer from some serious error or the decision is against the weight of evidence.

[2] From the evidence it is clear that for the purpose of approving a loan requires the approval of three Exco members. Once any three Exco members gave their approval and the money was disbursed then it was a loan. When the two other Board members and the appellant signed those cheques, the act of signing was tantamount to an approval especially taking into consideration that they knew that those cheques were for loans to be given to the three named persons. It is no concern of the Court that after the loans were given the Board discovered some defects or irregularities in the applications or processing of the loans. At the most the three of them have to explain their actions to the full Board or members of the Koop in approving the loans.

[3] The prosecution's attempt to avoid invoking s. 33 of the Evidence Act is misconceived. It is manifestly clear that the only way any evidence given by a witness or witnesses can be used in a subsequent and different proceeding is by way of s. 33 of the Evidence Act.

[4] Exhibit P75(B) should not have been admitted. Without exhibit P75(B) there is no evidence to show that the appellant ever used the money as claimed by the prosecution. As such there is no evidence of conversion of the money for the appellant's own use.

[5] Taking into consideration the defence put up by the appellant his story is highly probable if it is not true. As such he has discharged the onus on him or at the very least his defence has raised a reasonable doubt.

[Appeal allowed. Conviction of the Appellant set aside].

Cases referred to:

Chia Hon Kiat v.R [1937] MLJ 261 (foll)
*Goh Ah Sau. v. R [1938] MLJ 95 **(foll)***
Yap Sing Hock & Anor. v. P.P. [1992] 1 AMR 471 [1992]4 CLJ 1950 (foll)
*P.P. v. Yeoh Teck Chye [1981]2 MLJ 176 **(not foll)***
P.P.v.DatukHarunBinldris & Ors. [1977] 1 MLJ 180 (not foll)
Lim Peng Koi v. Rex [1951] MLJ 70 (foll)
See Yew Foo v. P.P. [1949]MLJ 131 (foll)

Legislation referred to:

Penal Codes. 409
Evidence Act 1950 ss. 33,74,78
Extradition (Commonwealth Countries) Act 1966, s. 33AB

For *the appellant - Mohd. Shafee Abdullah; M/s.Shafee & Co.*
For the Public Prosecutor - Ng Aik Guan, DPP

JUDGMENT

Hj. Mokhtar Hj. Sidin J:

This is an appeal by the Accused person, Dato' Yap Peng @ Yap Piang Tau, against the decision of the Learned Sessions Court Judge who had found him guilty of two offences punishable under s. 409 of the Penal Code. The appeal is both against the conviction and the sentence. For the purposes of this appeal it is appropriate for me to state the two charges preferred against the appellant:

> First *Charge:*
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> That you between 28 April 1986 and 3 May 1986, at the Federal Territory of Kuala Lumpur, being an agent of Koperasi Sepadu Berhad, to wit, the Chairman and in such capacity entrusted with the dominion over certain property to wit, RM2,600,000.00 committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 409 of the Penal Code.
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> *Second Charge:*
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> That you between 28 April 1986 and 2 May 1986, at the Federal Territory of Kuala Lumpur, being an agent of Koperasi Sepadu Berhad, to wit, the Chairman and in such capacity entrusted with the dominion over certain property to wit, RM500,000.00 committed criminal breach of trust in respect of the said property and that you have thereby committed an offence punishable under s. 409 of the Penal Code.

As can be seen, the charges are almost identical except for the amounts. From the Record of Appeal it is clear that the first charge was in respect of a loan purported to be given to one Justin Gomez (PW1) and the second charge was in respect of another loan purported to be given to one Ong Siew Kok (PW2).

It was common ground that at the material time the appellant was the Chairman of the Board of Directors of Koperasi Sepadu Berhad, hereinafter referred to as the Koop, and also the Chairman of the Executive Committee (Exco) of the said Koop. The appellant was also at the material time the Chairman of Dayapi Holdings. The main offices of the Koop and Dayapi Holdings were situated in the same building which was at 84/86, Jalan Ipoh, Kuala Lumpur. It is clear from the evidence that the appellant before he left for Australia told one PW15 (Wong Wee Loon) that he might be in need of money for the purposes of investments in Australia. Whether the investments were for himself or for the Koop was one of the issues being raised during the appeal which would be dealt with later. For that purpose the appellant left instructions to PW15 who was the Administration and Financial Manager to prepare the necessary applications to the Koop for three separate loans under three different names of members of the Koop (all of them were in existence and not fictitious). Two of those loans are the subject matter of this appeal. According to PW15 the names given to him were those of PW1, PW2 and one other person by the name of Cheah Chin Huat which is not relevant to this appeal. It is obvious to me that the appellant left those instructions because he was not sure how much was actually required by him for the investments. He would only know the figure when he reached Australia. The appellant also gave instructions to PW15 to collect the necessary collaterals for those loans from his sister by the name of Yap Tai Moi. The appellant being one of the signatories to the cheques of the Koop signed three blank cheques for the purposes of those loans. The appellant told PW15 that he would give the necessary instructions from Australia as to the amounts to be taken by those three named persons.

On 2 May 1986 the appellant called PW15 from Perth, Australia and informed PW15 the amounts to be taken *viz* in the name of PW1 the sum of RM2.6 million (which is the subject matter of the first charge) and in the name of PW2 the sum of RM500,000.00 (which is the subject matter of the second charge). PW15 was also told by the appellant to prepare the necessary cheques, approval forms and cheques for those loans and told PW15 to get the necessary collaterals for those loans from his sister. PW15 was also told by the appellant to cash the cheques and to hand over the cash to his brother.

PW15 gave evidence that pursuant to those instructions, he in turn gave instructions to his staff to prepare the necessary documents for those loans, the approvals and also the cheques. PW15 gave evidence that before the appellant left for Australia, the appellant had already signed the approval documents and the cheques. It is also clear from the evidence that both the approval documents and the cheques needed two other authorised signatories of the

Koop in order for them to be validated. It is clear from the evidence that the appellant told PW15 to get the necessary signatures from the two other Exco members.

It was contended by the appellant that the following are the issues in the present appeal:

(1) the moneys taken from the Koop were proper loans and as such the charge on criminal breach of trust could not stand;
(2) if the moneys were not loans, the appellant had not committed the offences of criminal Breach of Trust because the moneys taken were used to buy shares on behalf of the Koop; and
(3) there was no evidence that the moneys were used by the appellant in Australia for the purchase of shares as alleged by the prosecution.

If the answer to the first issue is in the affirmative, I believe it is not necessary for me to consider the second and the third issues. In my view the second and third issues should be dealt together since they are inter-related.

Before proceeding further it was raised by the Respondent that the Appellate Court had no right to disturb the findings of fact by the Trial Court. It was contended by the Respondent that the decision of the Learned Sessions Court Judge was based on finding of fact by her and as such I could not disturb the findings of fact. I agree with the Learned DPP that it is trite law that an Appellate Court does not interfere with the findings of facts of the Trial Court. But there are exceptions to this rule. An Appellate Court is always empowered to interfere and must so interfere if the so-called findings of facts of the Trial Judge suffer from some serious error or the decision is against the weight of evidence. Thus in the case *of Chia Hon Kiat v. R.* [1937] MLJ 261 it was held that:

> An Appellate Court should but rarely interfere with the conclusions arrived at by the Judge or Magistrate who has had the advantage of hearing the witnesses and obtaining the impression of their verocity from their demeanour. **But it is the duty of an Appellate Court to be a Judge of fact as well as of law and it would be abrogating its functions if it made a hard and fast rule never to interfere with the findings of fact, and felt bound to support a judgment which, on a review of all the evidence, it considered to be clearly wrong.**

Again in the case of *Goh Ah Sau v. R.* [1938] MLJ 95 the same principle was stated by the Court as follows:

> Although an Appellate Court is reluctant to reverse a Magistrate's decision based on a finding of fact, it should set aside the orders of the lower Court if it is of opinion that such evidence is against the weight of evidence.

It is in the light of principles laid down above I am considering this appeal. The cornerstone of my decision here is in fact a reconsideration of the facts presented which the Learned Sessions Judge failed to appreciate adequately. The few issues of law raised herein, although important does not have any effect on my substantive decision herein.

(i) *Whether the money taken were loans:*

In respect of this the Learned Sessions Court Judge stated in her judgment as follows:

> On the issue as to whether the money taken out in the names of Justin Gomez (PW1) and Ong Siew Kok (PW2) were loans or not, evidence had been adduced that their loan applications forms came about on the initiation of the Accused who had given the instruction to PW15. PW1 did not sign or submit any loan application forms, whereas PW2 did so after the said money had been disbursed. On the loan approval forms of PW1 and PW2 [i.e. Exhibits P2(b) and P8(a)], there was only the signature of the Accused approving the purported loans. Furtherthere were no securities provided for these "loans" since only photostat copies of share certificates were purportedly pledged, therefore no legal documentation could be done in respect of these collaterals. Hence basing on all the documents in respect of this so-called loans, it could be seen that not only were they lacking in documentation but were also done in accordance to the normal practice in Sepadu. No doubt, what the defence said it was not the responsibility of the Accused but that of PW15 to see that the documentations must be completed was true, nevertheless there was the unchallenged evidence that the Accused was aware of this and he had been putting off the matter since his main concern was to have the money taken out first. This could be seen in the testimony of PW15.

Looking at the evidence it is clear to me from the record that PW15 was one of the most trusted employee of the appellant. From the evidence it was normal for the appellant to give instructions to PW15 and PW15 would carry

out those instructions. PW15 stated in his evidence that he took instructions from the Chairman of the Koop who was the appellant and also the General Manager. It is clear to me that once the appellant gave any instruction then PW15 would carry it out. From the evidence of PW15 himself it is clear that the appellant gave instructions to PW15 to apply for the loans in the names of three persons whom the appellant knew and trusted. The appellant being one of the Exco and Board members was a person amongst three who could approve the loans. He signified his approval on the three loans. Although PW15 reminded the appellant that loans had to be approved by three Board members, I believe the appellant knew of this. This is apparent when he instructed PW15 to get the approvals from two other Board members and he even named them. In my view when the appellant told PW15 to prepare the loan applications he was giving instructions to PW15 to have proper documentation for such applications. He even told PW15 to get the necessary collaterals from his sister. PW15 himself confirmed those instructions. If PW15 had carried out the instructions and prepared the proper documentation I believe there would be no question about the loans. It was because of the improper documentation that the problem now arose.

Firstly, could it be said, as contended by the prosecution, because of the improper documentation those were not loans. Secondly, could the appellant be blamed for the failure of PW15 to carry out the instructions given by him *viz.* to prepare the proper documents for the loans. I believe the answer to both depends on the evidence and circumstances of the case.

It is pertinent to point out at the material time PW15 was the Administration and Financial Manager of the Koop. It was his duty to inform the appellant that the loans could not be given because the papers were not in order and the necessary approvals had not been obtained. In his evidence PW15 gave the reason for not doing so on the ground that he was scared of the appellant. He did not give any reason for his fear and he had not cited any instance previously whereby the appellant had put him to fear. Though the appellant was the Chairman, the power of dismissal of the staff especially the senior management belonged to the Exco which I believe at the material time there were not less than ten members. Could the evidence of PW15 be accepted without any basis? On the other hand there is evidence from other prosecution witnesses that the appellant had never threatened anybody.

The Learned Sessions Court Judge was influencedby the fact in the present case that it was not the normal practice to release the loans before the approvals were given. What was actually the normal practice in the Koop of giving loans? PW15 gave evidence of how a loan application should be made and this was contained in the Loan Manual Operation authored by him. From the evidence it is clear to me that this manual never came into effect because of the simple reason that it was never approved. Was this practice as stated by PW15 followed? It appears to me that in many instances this practice was not followed. There is evidence to show that in some instances the loans had been disbursed before approvals of the Exco or the Board were given. There is no evidence to show that the proper documentation had been prepared prior to the loan disbursements. This could be seen from Exhibit P56. As such in the said context I am of the view that it was nothing strange if the approved loans had been disbursed before the proper documentations and other formal approvals had been obtained. It is no secret the reasons the Koop went into receivership and one of them was because of the poor management one of which was the disbursement of loans. It seems that the practice had met with the blessing of the Board. I believe the burden is always on the prosecution to satisfy the Court the loans given in the present case were abnormal and out of turn so that they could be branded as non-loans.

As I have stated earlier the instructions given by the appellant to PW15 were to apply for loans. Since PW15 was the best person in the Koop to know about the procedure for loan applications he was expected by the appellant to do so properly. He had neglected or failed to follow the practice that he himself prepared, could the appellant now be blamed for the failures of PW15. He was instrumental in applying for the loans and the cashing of the cheques. As such I tend to agree with the appellants counsel that he was to be treated as an accomplice just like PW1 and PW2. Even if he was not an accomplice there is clear evidence to show that he was trying to protect himself and put the whole blame on the appellant - a tainted witness! As such how much weight could his evidence be relied on?

As can be seen from the events the loans given in this case were given shortly before the assets of the Koop were frozen by Bank Negara about two or three months after the loans were given. To me this is significant. From Exhibit P56 it is clear to me that in certain cases subsequent formal approvals had been given later perhaps two to three months after the loans had been disbursed. From this I cannot help myself for taking the view that PW15 and the two Exco members who signed the cheques were aware that formal approvals could be obtained at subsequent Exco or Board meetings and that was why they agreed to the two loans for the share instruments when the two Exco members signed the cheques and PW15 cashed them.

As to the collaterals which were to be used for the loans there is evidence to show that PW15 and the two Board members who signed the cheques knew of the collaterals. In fact Dr. Choo, one of the signatory to the three cheques requested for extra collaterals to be pledged for the loans. PW15 gave evidence that he could not get those collaterals from the appellant's sister but there is no evidence to show that he had informed the appellant of his failure to do so or the note by PW18 (Dr. Choo) for additional collaterals to be pledged. He could have done so when the appellant called him from Australia.

As to the loan given to PW2 proper documentation had been complied with though they were done later. I see no reason to categorise that loan as a non-loan simply because documentation were slow. As to the loan given to PW1 there is evidence that he had not signed the application forms for the loan, but there is no evidence to show that he had refused to apply for the said loan. He informed PW15 that before he signed the documents he would like to discuss the matter with the appellant when the latter returned from Australia. I believe PW1 was cautious because of the large amount of loan taken in his name. Anyway, it is clear that he signed the acceptance form for the cheque. To me this signified that he knew that the cheque was for a loan to be taken in his name and that he had accepted the loan. What he wanted to do with or what he did with the money is no concern of the Court. The formality of signing the application forms was only procedural, but the fact still remains when signed to accept the cheque a loan was already given to him and he knew about it. From the evidence it is clear to me that PW1 knew the cheque was for a loan and for whom the money was meant. Legally, in my view, the money which was the subject matter of the charges belonged to PW1 and PW2 from then onwards and when it was handed to the brother of the appellant it was not the property of the Koop anymore. Any redress by the Koop in respect of those loans including any defect in the applications, disbursements or repayments would be against PW1 and PW2. Numerous minutes had been produced by the prosecution but there was no evidence to show those loans were ever queried or the appellant was asked at the Exco or Board meetings despite the fact that some if not all the Board members knew about those loans. In my view if the Board members were not treating those loans as loans then the members could raise the matter at the Board meetings. The non-discussion of those loans despite the knowledge of their existence to me strengthened the argument that the Exco had approved them for a certain purpose. There is no doubt about this.

It was contended by the prosecution that when the two other Board members signed the cheques they were not approvals for the loans. All the signatories on those cheques knew that the cheques were for loans. It is for the prosecution to prove and satisfy the Court that the cheques were otherwise. To me mere assertions that they were not loans is not sufficient to categorise them as non-loans. It is not the burden of the appellant to satisfy the Court that the cheques were for loans unless it could be established by clear evidence that the cheques were not loans given. From the evidence I find that the prosecution had failed to prove that the money were not loans.

From the evidence it is clear to me that for the purpose of approving a loan it requires the approval of three Exco members (this point is agreed upon by both parties). Once any three Exco members gave their approvals and the money was disbursed then it was a loan. When the two other Board members and the appellant signed those cheques, to me the act of signing tantamounts to an approval especially taking into consideration that they knew that those cheques were for loans to be given to the three named persons. I believe it is not the concern of the Court that after the loans were given the Board discovered some defects or irregularities in the applications or processing

of the loans. At the most the three of them have to explain their actions to the full Board or members of the Koop in approving the loans. Take for example in the case of a loan that had already been approved and given when it was discovered the collateral given was not what it would be purported to be or the guarantors were not persons of certain standing as required could the institution who gave the loan then consider that loan to be non-loan. I believe it could not be so. The recourse for the institution is to recall the loan or take action against its officers who had processed and approved the loan. Thus Peh Swee Chin SCJ in the case *of Yap Sing Hock &Anor v. P.P.* [1992] 1 AMR 47 at page 66 and 67 had this to say:

> On the second charge, the evidence against the appellants was that first appellant had instructed the accountant of the Holdings Company to write a cheque for RM2,500,751.00 (the subject matter of the second charge) in order to buy a banker's draft to be made payable to a sharebroking company called "Ariffin & Low Securities Sdn Bhd" to buy shares in a public listed company called Muda Holdings Bhd. The cheque was signed by both appellants. The accountant was a certified accountant with the academic qualification of 'ACCA'. The payment voucher was prepared for the said cheque for Holdings Company with the words "advance to payee" and payee was the first appellant who signed acknowledgment of receipt and the payment voucher was approved by second appellant. The said accountant wrote on the reverse of the said payment voucher the words "Ariffin & Low Securities Sdn Bhd" to indicate the application for the banker's draft. The accounts produced showed the said advance and other advances to the first appellant from the Holdings Company. All the documents, evidence, cheque, payment voucher and accounts were all prepared long before the police investigation started. All these evidence was apparently accepted by the learned Sessions Court judge, and the High Court did not accept it as a loan because his Lordship said to the effect that to give a loan there must be money (available) in order to give such a loan, and the sum of RM2,500,751.00 was wrongly gained or acquired by the Holdings Company out of the RM12 million transferred from Lien Hoe.
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> The first appellant in his defence admitted the loan but said to the effect that the loan was to enable him to gain control ultimately of the public listed company *viz.* Muda Holdings Bhd when Lien Hoe would be sold at a handsome profit for this purpose.
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> We have the misfortune of differtng from the very able judge and we have to express our disagreement. Since the second charge referred to the commission of breach of trust against the property of the Holdings Company and not Lien Hoe, it would not be appropriate to rely on the allegedly illegal origin or source of the money of the Holdings Company so as to stamp the money which was drawn out and lent to the first appellant as non-available legally for lending.
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> It must be observed that the loan or advance in the circumstances of this case as described above was not prohibited by the Companies Act 1965, for example, it was not a loan by Holdings Company to first appellant to buy shares in the Holdings Company itself (e.g. s. 67 of the Act); neither was it a loan to directors as prohibited by s. 133 of the Act, the Holdings Company being an exempt private company, nor was it prohibited by memorandum and articles of association of the Holdings Company.
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> Since wrongful loss or wrongful gain, *inter alia*, is necessarily loss or gain by unlawful means, there is no evidence of unlawfulness about the loan which could render the appellants to prosecution, bearing in mind what has been said just now. Of Course the first appellant could be liable to an action by the Holdings Company to recover the loan, this, however, in our opinion, is definitely not enough and self-evidently so too, for a borrower cannot be simply, said to cause loss to his lender by unlawful means because such borrower can be sued in court. Both the appellants should not have been called for their defence. We therefore think his conviction under the second charge cannot stand also.

The prosecution cited the case of *PP v. Yeoh Teck Chye* [1981] 2 MLJ 176 to support his contention. With the greatest respect I believe there is a distinction between that case and the present case. In that case it is clear to me that the cheques approved by the second Accused for payment to the third Accused were in excess of the amount granted under the overdraft facilities given to the third Accused. The second Accused had no power to approve payments for amounts in excess of the overdraft facilities. Thus the Court had found the second Accused guilty of the offence of CBT when he authorised the payment in excess of the overdraft facilities. That is not the case here. In this case the three persons who had signed the cheques collectively had the power to approve

the loans (a non-disputed point). The prosecution has not adduced any evidence to show that the three of them had no power to approve loans or that the three loan applicants were not eligible for such loans.

It is the same with the case of *PP v. Datuk Harun bin ldris & Ors.* [1977] 1 MLJ 180 where the facts were totally different from the present case. In that case the Accused persons had no authority whatsoever to do what they did. In the present case the three persons had the power and the ability to approve the loans and to sign the cheques. Thus from the evidence I am of the view that the Learned Sessions Court Judge had erred when she held that the money were not loans when there were no evidence to support that finding.

(ii) & (iii) *The question whether there was evidence to show that the appellant had bought shares in Australia and thus by doing so committed criminal breach of trust.*

Assuming that the money given were not loans, the Court has to consider whether there was entrustment of the money to the appellant and that he used the money to buy shares for his own. Since these two issues are so closely interrelated it is better for me to deal with them together. First of all whether the money had been entrusted to the Accused by the Koop. It is in evidence that the cheques were issued in the names of three applicants. It is clear from the evidence that it was PW15 who went to the bank and cashed the cheques. It is also clear from the evidence that the money was handed to one Yap Piang Hui (appellant's brother) as instructed by the appellant. PW15 gave evidence that he was instructed by the appellant to hand over the money to the said Yap Piang Hui who would then make his own arrangement for the money to be sent to Australia. According to PW15 the appellant gave an account number at Westpac Bank for the money to be remitted there. There is no evidence that the money was remitted to the said bank account.

To prove that the money was actually remitted to that account and that the money from that account was utilised to purchase the shares in Australia the prosecution produced Exhibit P75(B). Exhibit P75(B) was the Notes of Proceeding in the Court of Petty Sessions of Western Australia at Perth pursuant to s. 33AB of the Extradition (Commonwealth Countries) Act 1966. The Learned Sessions Court Judge admitted this exhibit under s. 74 of the Evidence Act 1950 despite the objection by the Defence Counsel on its admission. Both sides knew the importance of this exhibit which the prosecution used to bridge the gap in its case to show that the money in that account was used by the appellant to purchase the GCA shares (Exhibit P71).

In respect of Exhibit P75(B) the Learned Sessions Court Judge had this to say in the judgment:

> Through the Investigation Officer, DSP Zakaria Jusoh (PW21), the GCA shares were produced and marked by the Court as Exhibit P71. This share certificate was under the name of the Accused and it was dated 9 May 1986. These GCA shares were purchased by the Accused. **Evidence as regards to this Purchase could be seen from the scripts of evidence taken by the Court of Petty Sessions of Western Australia at Perth. This record of proceedings has been marked as P75(B).**
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> Defence Counsel has objected to the admissibility of this record of proceeding. After hearing the submissions from both sides, I ruled that this record of proceeding which was taken pursuant to s.33AB of the Extradition (Commonwealth Countries) Act 1966 was admissible in Court since it was a public document as provided for under s. 74(a)(iii) of the Evidence Act 1950.
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> (Emphasis is mine).

It is obvious to me that the Learned Sessions Court Judge admitted the said Exhibit P75(B) under s.74(a)(iii) of the Evidence Act 1950. The prosecution had earlier urged the admission of this exhibit under section 74 of the Evidence Act because it was certified under section 78 of the same Act. In my view the Learned Sessions Court Judge had erred in law when she admitted that exhibit despite the objections.

It was contended by the appellant that Exhibit P75(B) should not have been admitted because of non-compliance with section 33 of the Evidence Act. It is obvious to me the purpose of the prosecution to produce the said exhibit was its relevancy in proving in a subsequent judicial proceeding the truth of the facts which it stated. From the judgment of the Learned Sessions Court Judge I have quoted above this was what the Learned Sessions Court Judge had done. Section 33 reads as follows:

33. Relevancy of certain evidence for proving in subsequent proceeding **the truth of facts therein stated.**

Evidence given by a witness in a judicial proceeding, or before any person authorized by laws to take it, **is relevant for the purpose of proving** in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, **the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which under the circumstances of the case the Court considers unreasonable.**

Provided that:

(a) **the proceeding was between the same parties or their representatives in interest;**

(b) **the adverse party in the first proceeding had the right and opportunity to cross-examine;**

(c) **the questions in issue were substantially the same in the first as in the second proceeding.**

Explanation: A criminal trial or inquiry shall be deemed to be a proceeding between the prosecution and the Accused within the meaning of this section.

(Emphasis is mine).

From the above it is clear that notes of a judicial proceeding could be used only for the purposes stated therein. It is obvious to me that when the prosecution produced Exhibit P75(B) it was for the purposes as provided in section 33 of the Evidence Act. Section 33 provides for certain conditions and pre-requisites which must be satisfied before notes of a judicial proceeding could be produced and used in any trial. It is to be noted that when the Learned Sessions Court Judge admitted Exhibit P75(B) she did so under section 74 of the Evidence Act. With the greatest respect to her, in my view section 74 only provides the categorising of a public document and nothing more than that. Section 78 of the Evidence Act is only for the purposes of certification of a public document. The purpose of categorising and the certificate is to make it easier for its production without the necessity of calling the maker or the keeper of such document to give in evidence to prove the existence of such document. In my view that is the only purpose of Sections 74 and 78 of the Evidence Act 1950. The relevancy and the admissibility of such document is governed by the provisions of other sections of the Act or other laws. In my opinion before such document could be admitted the conditions and pre-requisites of the section under which it is to be used must be satisfied. The prosecution's attempt to avoid invoking section 33 is misconceived. It is manifestly clear that the only way any evidence given by a witness or witnesses can be used in a subsequent and different judicial proceeding is by way of section 33 of the Evidence Act 1950.

As I have stated earlier before such document could be admitted and used in Court under section 33 of the Evidence Act certain conditions and pre-requisites as provided for in that section must be satisfied. Though the appellant in the lower Court raised objection on only one limb *viz.* that the appellant was not given the opportunity to cross-examine at the hearing in Australia, I believe all the limbs must be satisfied.

In respect of this Murray-Aynsley CJ (as he was then) in the case *of Lim Peng Koi v. Rex.* [1951] MLJ 70 where he said:

> Here we have to consider the meaning of the words "without an amount of ...expense which under the circumstances of the case the Court considers unreasonable". To determine when the expense is unreasonable is not a matter in which absolute standards can be applied. In particular two things are of importance; the seriousness of the charge and the character of the evidence. On the first point, in particular, it should be regarded as a very serious matter to allow evidence given on another occasion to be read when a person is charged with an offence for which he is likely to be sentenced to imprisonment. On the second point it may be that the evidence given is not challenged by the defence and it may be evidence of a purely formal character.
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> In the present case the appellant was convicted and sentenced to six months rigorous imprisonment. The evidence was only evidence of the crucial facts in issue and it was very strongly challenged by the defence. A further difficulty arose from the fact that when the evidence was originally given certain matters which should not have been admitted were let in. The trial was begun again before another District Judge and the evidence then put in under the provisions of the section in question was not the evidence as originally given but

> an expurgated version compiled by the Police Officer and counsel who at that stage represented the appellant. I do not see that there is any legal justification for this proceeding, but by itself it might not in the circumstances be of sufficient importance to justify quashing the conviction. Although at the time no objection was taken by the gentlemen who then represented the appellant, I cannot consider the trial as satisfactory and I, therefore, ordered a new trial.

Then in the case *of See Yew Poo v. P. P.* [1949] MLJ 131 at pages 133 and 134 Russel, J. had this to say on s. 33:

> We should, however, like to refer to the admission of the deposition of the witness Lai Chow. The evidence of the OCPD Labis showed that this witness was under arrest at the time of the trial in Johore Bahru. We think that the power to admit the deposition of absent witnesses under s. 33 of the Evidence Enactment should be exercised with caution and there was nothing on the record to show that this witness could not, by care and the use of ordinary means, have been produced to give evidence. We therefore think that this deposition was improperly admitted *Mowyar alias Nane Khan v. The Queen,*

The prosecution had not given any reason why the witnesses upon which the evidence was relied on in Exhibit P75(B) could not be called to give evidence in the trial Court. The prosecution required the evidence stated in Exhibit P75(B) in proving that the appellant used the relevant funds to purchase the shares in Australia. The Court on its own could not imply the reasons why those witnesses were not called. In my view it is the duty of the prosecution to explain by evidence why they wanted to use Exhibit P75(B) instead of calling the witnesses themselves at the trial.

As to the objection raised by the appellant, the prosecution admitted that the Notice of Hearing was not served on the appellant but instead served it on Messrs. Sri Ram & Zulkifli. I do not know why this was done. It is clear to me that the required notice notifying the appellant of his right to cross-examine the witness in Perth must be personally served on the appellant bearing in mind that this is a criminal trial where the liberty of a person is at stake. The section itself states:

> Provided that:
>
> (b) the adverse party in the first proceeding had the right and opportunity to cross-examine;.

As such I am of the view that when the prosecution claimed that they had served the notice on Messrs. Sri Ram they did not comply with section 33 and as such the appellant was not given the right and opportunity to cross-examine. In any case, apart from a mere statement from the Bar by the Learned Deputy Public Prosecutor, there was no proof that Messrs. Sri Ram & Zulkifli was ever legally served with the notice.

The next point to be considered is whether the proceeding was between the same parties as stated in the explanation to section 33. On this the prosecution did not adduce any evidence to show that the Public Prosecutor was a party to the proceeding which took place in Exhibit P75(B). It is clear that the appellant was one of the parties. On this ground I am of the view the requirement under limb (a) was not satisfied as well.

As such I am of the view that the Learned Sessions Court Judge had erred in law when she admitted and used Exhibit P75(B). In my view Exhibit P75(B) should not have been admitted. Without Exhibit P75(B) there is no evidence to show that the appellant ever used the money as claimed by the prosecution. As such there is no evidence of conversion of the money for the appellant's own use.

On the whole I am of the view that the Learned Sessions Court Judge had erred when she called the appellant for his defence at the close of the prosecution case.

Assuming that I am wrong in my finding that there was no evidence for a *prima facie* case when in fact there was, the Learned Sessions Court should have considered the defence more thoroughly. It was the appellant's defence that the money was not used for his own benefit but for the benefit of the Koop. It was the case for the prosecution that the appellant bought those shares in his own name and for his own purpose. It is common ground that the GCA shares were in the name of the appellant. It is the contention of the prosecution that the purchase of those shares were never discussed at any Board meeting and as such it was never the intention of the appellant to buy the shares for the Koop. To support this contention, the prosecution produced Exhibit P34, the minutes of a Board meeting. In that minute there was no mention of the purchase of shares at the meeting. Exhibit P34 was to counter Exhibit P36

which surfaced during the prosecution case. It is clear in Exhibit P36 that there was discussion of the shares. It should be noted that both Exhibits P34 and P36 were in respect of the same Board meeting. It should also be noted that Exhibit P34 was never signed whereas Exhibit P36 was signed by the appellant as Chairman of the Board. Under the bye-laws of the Koop the minutes of the Board meeting was required to be signed by the Chairman and in his absence by any member of the Board authorised to do so. In order to prove that Exhibit P34 was the authentic copy, the prosecution adduced extrinsic evidence by way of testimony from several witnesses amongst others Chan Heng, PW15, PW18, Gary Yong and Morris Samson. All these people were either the Board members or the staff members of the Koop. Despite of it not being signed the Learned Sessions Court Judge admitted Exhibit P34 and rejected Exhibit P36. She did so on the basis of the evidence of those witnesses. In my view the Learned Sessions Court Judge had erred when she admitted and accepted Exhibit P34 and rejected Exhibit P36.

Exhibit P34 was accepted as evidence of truth based entirely on the testimony of several witnesses which from the record appears to have self-interest to safeguard. From the record it appears that a tape-recording was made at the meeting and it was stated that from the recording Exhibit P34 was the true minute. This tape-recording was never produced and no reason was given by the prosecution why the said tape-recording was never produced. As such adverse inference should be drawn on the non-production of the tape.

As I have stated earlier the witnesses who testified on Exhibit P34 were either Exco members or staff of the Koop. It is clear to me from the evidence the affairs of the Koop managed by the Exco had much to be desired. Because of the sorry state of affairs of the Koop, Bank Negara had frozen the assets and took over the affairs of the Koop by appointing receivers. When I said the Exco it included the appellant. It is common ground that when Bank Negara froze the Koop, the assets of the Board members were also frozen and their passports were also seized. Taking into consideration all those I have stated how reliable can those witnesses be. Some of them even admitted that they would do anything as long as their assets and passports were released. They said this when they were questioned as to why they signed the Trust Deed. It appears to me that it was most convenient for them to shift the whole blame onto the appellant rather than taking the joint responsibility as Board/Exco members since the appellant had been charged. Thus, short of calling them as accomplices as alleged by the defence these people had their self-interests when they gave evidence. In my view their testimonies must be treated with care and close scrutinization of their evidence must be made. This the Learned Sessions Court Judge had failed to do when she accepted Exhibit P34 and rejected Exhibit P36.

For the above reasons I am of the view that the Learned Sessions Court Judge had erred when she accepted Exhibit P34 and rejected Exhibit P36. Basing on the evidence as a whole the proper thing for her to do was to admit Exhibit P36 and reject Exhibit P34. Then it should be the duty of the prosecution to prove that Exhibit P36 was a fraud, forgery or not genuine. Based on the evidence it was for her to decide whether to accept or reject Exhibit P36 instead of Exhibit P34.

Exhibit P36 was not on its own. It appears the authenticity of Exhibit P36 was supported by the Trust Deed. DW4 (Mr. Kok Chee Keong) gave evidence that he prepared the Trust Deed (Exhibit P35) whereby the Board members acknowledged that the appellant bought the shares for the Koop. The prosecution applied to impeach the credit of this witness but failed. The prosecution attempted to reject Exhibit P35 by testimony of several witnesses who claimed that they were pressured. It is obvious to me that according to those witnesses they signed the Trust Deed not due to pressure by the appellant but by the freezing of their personal assets and the seizing of their passports by Bank Negara. This fortified my view that these people would go to any distance just to clear themselves and put the blame on others. It must be remembered that these people were educated people and some of them very highly educated. It was unlikely that they would sign documents which was not true especially when the document was only three pages long. DW4 confirmed that those people signed Exhibit P35 voluntarily confirming that the purchase of shares by the appellant was for the Koop as minuted in Exhibit P36. DW.4 confirmed that when he prepared Exhibit P35 he had seen Exhibit P36 in a minute book.

Exhibit P36 was further supported by the evidence of DW8 (Encik Baharom Darus). The prosecution in producing Exhibit P34 attempted to show that Exhibit P36 was cooked up much later in order to save the appellant. According to DW8 he had seen Exhibit P36 within the first week *viz.* before 15 August 1986 when his first report which was similar in contents to the White Paper submitted to Bank Negara. The relevant passage of the White Paper was produced before the Court. In my view the Learned Sessions Court Judge had erred when she rejected Exhibit P36 because the prosecution had failed to prove that the document was a fraud or forged. In my opinion only on those grounds could Exhibit P36 be rejected since it was also a signed document. With that document it is clear to me that when the appellant bought those shares he bought them on behalf of the Koop.

One last point to be considered was why he did not obtain the consent of the Registrar of Societies when he purchased those shares. The Registrar of Societies who came to give evidence for the prosecution admitted that there was no limitation for the Koop to buy shares from outside Malaysia but permission must be obtained to do so. The Registrar indirectly admitted that his Department was slow in responding to any request for permission to purchase shares and in some cases there was no response at all. It could not be denied the Koop in the present case was an investment enterprise including the purchase and sale of shares. It could not be denied that in the modern world investment in shares must be done at the most opportune time. The purchase of shares must be made when the price is low and the sale when the price is high in order to make any worthwhile profit. In some cases this happened within a few days. According to the appellant if the Exco had to wait for approvals then the golden opportunity would be missed. It was because of that he and the Exco did not seek the approvals from the Registrar.

As I have said my decision is based on facts. I have re-examined very carefully the testimonies of various prosecution witnesses. I find that the witnesses in the form of Maurice Samson, Gary Yong, Dr. Choo, Wong Lee Loon were witnesses who were trying to save their own skins through ignorance. They were unimpressive. In certain instances their testimonies were ridiculous. The Learned Sessions Court Judge had not dealt with them adequately. I have the greatest of doubts on the veracity of these witnesses. PW1 (Justin Gomez) struck me as a witness who is confused between telling the truth and saving his own skin, *viz.* relating to a possible liability by him of the loan. As such there were areas he could not be believed. Chan Heng, inspite of his impressive qualifications was finally reduced to a state of being absurd in major areas of his testimonies. Perhaps this is the reason the Learned Sessions Court Judge did not make much mention of him.

The point that I raised in relation to Exhibit P75(B) does not in any way, assuming I am wrong in my interpretation of the law, affect my substantive decisions here as my decision is mainly based on revaluation of the facts presented.

Taking into consideration the defence put up by the appellant I find that his story is highly probable if it is not true. As such he has discharged the onus on him or at the very least his defence has raised a reasonable doubt in my mind. Both DW4 and DW8 appears to me to be independent witnesses. They have got nothing to gain when they gave evidence for the appellant. It appears to me the Learned Sessions Court Judge has erred in not considering their evidence but just brushed them aside. The Learned Sessions Court Judge had not given due attention to the significance of the White Paper and various other documents that speak for themselves.

For the above reasons I am of the view that the Sessions Court Judge has erred in her decision. The appeal is hereby allowed and the conviction of the appellant is hereby set aside. The appellant is hereby discharged and acquitted . All other orders made by the Learned Sessions Court are also set aside.